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"Keeping Up With Technology": An Analysis of the Fourth Amendment Concerning the Search and Seizure of Students' Cell Phones to Investigate Instances of Bullying

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I. Introduction

In full, the Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[1] Under *New Jersey v. T.L.O.*, however, school administrators are not required to adhere to the strict letter of the Fourth Amendment.[2] In *T.L.O.*, the Supreme Court held that (1) school officials are not required to obtain a warrant in order to search a student under their authority; (2) school officials do not have to strictly adhere to the probable cause requirement in determining whether the search is lawful;[3] and (3) the legality of a search should depend on the reasonableness of the search in conjunction with the totality of the circumstances.[4] Instead of requiring school administrators to strictly adhere to the Fourth Amendment's requirements, the Supreme Court established a new standard for school officials' searches and seizures of students.[5] The standard provides that a search in this context is reasonable if it is (1) justified at its inception and (2) reasonable in its scope.[6] The Supreme Court, with this standard, attempted

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[1] U.S. CONST. amend. IV.
[2] N.J. v. T.L.O., 469 U.S. 325, 341 (1985).
[3] *Id.* at 326.
[4] *Id.*
[5] *See id.* at 340–41.
[6] *Id.* at 341.

to strike a balance between students' privacy interests in their personal property and schools' responsibility to maintain order and discipline among the student body.[7]

Although the *T.L.O.* standard has provided adequate flexibility for school officials to conduct searches and seizures of a student's bag or locker, the current test does not provide any guidance regarding a school official's ability to search and seize a student's cell phone when used on and off school grounds to bully another student. It is unclear, under *T.L.O.*, whether future courts reviewing this issue will favor (1) a student's privacy expectation in the information contained in modern cell phones, or (2) school officials' crucial responsibility of thoroughly investigating and preventing instances of bullying.

With the advancements in technology—particularly the increasing capabilities of smart phones—and the pervasive problem of bullying throughout our society, the current standard needs to be altered in order to allow school officials more flexibility to meet these contemporary obstacles. Bullying has become such a vexing concern that many state legislatures, including New Jersey, have passed specific laws that are aimed at preventing bullying in schools.[8] For example, New Jersey's anti-bullying statute "calls for tougher penalties to be doled out to students discovered to be bullying, and also makes school administrators more accountable if they do not investigate complaints."[9]

If these state anti-bullying statutes are going to hold school officials liable for not conducting proper investigations, then the courts must provide these administrators greater latitude in conducting searches and seizures in conjunction with bullying investigations. As this Comment will discuss later, bullying not only jeopardizes security on school grounds, but it also has a disparaging impact on a student's ability to complete assignments and pay attention during

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[7] *Id.*
[8] *See, e.g.*, Monsy Alvarado, *Halting Bullies is New Priority,* THE RECORD, Sept. 6, 2011, at A1.
[9] *Id.*

class.[10] Since advancements in technology—namely smart phones—compound the bullying problem, courts need to provide school administrators with more guidance on their authority to search and seize a student's cell phone in order to investigate a bullying allegation.

Part II of this Comment will discuss the two-prong standard that the Court established in *T.L.O.*, which attempts to balance a student's privacy interest against the school's interest in maintaining order and discipline.[11] This section will also analyze how this standard has provided some guidance regarding claims of unreasonable searches and seizures against school officials concerning students' personal property.

Part III will provide a discussion of (1) the capabilities of smart phones; (2) the increasing number of people—specifically students—who continue to purchase smart phones; and (3) the privacy interests that individuals have in their cell phones. An analysis of smart phones' capabilities and prevalence is necessary to highlight the students' privacy interests at issue. Part IV of this Comment will observe the pervasive bullying problem and discuss how this issue has become increasingly prevalent to the point that state legislatures are specifically tailoring laws to regulate the dangerous effects of bullying. An analysis of bullying and the state anti-bullying statutes—particularly New Jersey's statute—is necessary to highlight the schools' custodial interests.

Part V will analyze public-school officials' authority, under the current standard, to search cell phones used to bully students *during school hours*. Part VI will observe public school administrators' authority, under the current standard, to regulate cell phone use *off-campus*. This section will also discuss the reasons why the Supreme Court needs to alter *T.L.O.*

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[10] *See infra* note 120.
[11] *T.L.O.*, 469 U.S. at 341.

standard in order to adequately account for the continuing advancement of smart phones in conjunction with the pervasive issue of bullying in schools.

II. The Current Standard

A. *New Jersey v. T.L.O.*

Courts currently apply the *T.L.O.* standard to determine whether a school-conducted search of a student's personal property is constitutional.[12] In *T.L.O.*, an investigation ensued when a high school teacher discovered a freshman student smoking in the school lavatory and brought her down to the principal's office.[13] For this school, smoking cigarettes on school grounds was a violation of school rules.[14] When the student was asked to explain the incident, she denied that she was smoking in the bathroom.[15] After this, the assistant principal demanded to see her purse, in order to uncover evidence of the violation.[16] While searching the purse, the school official found cigarettes, cigarette rolling papers, a small quantity of marijuana, a pipe, and other evidence indicating that this student was involved in the consumption and transaction of marijuana.[17] In the State's delinquency case brought pursuant to this incident, the student claimed that the search of her purse was unreasonable, and thus violated her Fourth Amendment rights.[18]

The New Jersey Supreme Court held that the search was unreasonable.[19] The Supreme Court of the United States reversed. The Court found

> (1) that the Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials; (2) that school officials need not obtain a warrant before searching a student who is under their

[12] *See, e.g.*, Stafford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2635 (2009).
[13] *Id.* at 328.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *T.L.O.*, 469 U.S. at 329.
[19] *Id.* at 331.

> authority; (3) that school officials need not strictly adhere to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law, and that the legality of their search of a student should depend simply on the reasonableness, under all the circumstances, of the search, and (4) that the search in this case was not unreasonable under the Fourth Amendment.[20]

The Court established a twofold inquiry to determine the reasonableness of a school official's search of a student's property.[21] Such a search must be (1) justified at its inception; and (2) reasonable in scope.[22] The Court established this standard to strike an appropriate balance between "the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place . . . ."[23] The Court recognized that in the school setting, certain modifications to the Fourth Amendment's requirements for "reasonable" searches and seizures are appropriate.[24] Some of these alterations include warrantless searches and the relaxation of the "probable cause" requirement.[25] The Court also noted that the responsibility of school administrators to maintain order among the student body "requires a certain degree of flexibility in school disciplinary procedures" as well as the preservation of the "informality of the student-teacher relationship."[26]

The Court explained that, in order for a search in this context to be justified at its inception, there must be "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating . . . the rules of the school."[27] This requires "sufficient probability, not certainty."[28] The Court held that the search was justified at its

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[20] *Id.*
[21] *Id.* at 341 (citing Terry v. Ohio, 392 U.S. 1, 20 (1968)).
[22] *Id.*
[23] *Id.* at 340.
[24] *T.L.O.*, 469 U.S. at 340.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 341.
[28] *Id.* at 346 (quoting Hill v. Cal., 401 U.S. 797, 804 (1981)).

inception because a teacher discovered a clear violation of the student code and the search was conducted because of the specific information provided by school staff.[29]

Further, the Court posited that a search is reasonable in scope when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[30] The actual search should only be as intrusive as necessary with regards to the degree of suspicion.[31] The Court found that the search was reasonable in its scope because during the course of a lawful search for cigarettes, the school administrator(s) discovered reasonable suspicion of other school violations.[32]

The crux of this case is the effort that the Supreme Court made to strike a balance between students' privacy interests in their personal property and schools' responsibility to maintain discipline among the student body. As this Comment will analyze below, this standard, which has proven satisfactory in providing school officials with appropriate guidance for some time, is no longer adequate in light of society's technological advancements.

B. *T.L.O.* Application

After the *T.L.O.* Court established the standard for determining the reasonableness of school-conducted searches of student property, courts around the country began applying this test.[33] In *Commonwealth v. Snyder*, a student challenged the admissibility of evidence obtained from the warrantless search of his locker.[34] The search produced illegal substances, and the school reported its findings to the police; the student was subsequently arrested.[35] The plaintiff

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[29] *Id.* at 346.
[30] *T.L.O.*, 469 U.S. at 342.
[31] *Id.*
[32] *Id.* at 347.
[33] *See, e.g.*, Sims v. Bracken Cnty. Sch. Dist., No. 10-33-DLB, 2010 U.S. Dist. LEXIS 110822 (E.D.Ky. 2010).
[34] Commonwealth v. Snyder, 597 N.E.2d 1363, 1364 (Mass. 1992).
[35] *Id.* at 1365.

claimed that the search of his locker, which was conducted by a school official, violated the Fourth Amendment.[36] The Supreme Judicial Court of Massachusetts, citing *T.L.O.*, stated that the Fourth Amendment requirements need not be strictly adhered to in the school setting.[37] Further in line with this reasoning, the court held that a warrantless search of the student's locker without notice was not a violation of the Fourth Amendment because the search was reasonable at its inception and in its scope.[38]

In *In re*: Patrick Y, the Court of Appeals of Maryland held that the search of the student's locker was reasonable and thus not a violation of the Fourth Amendment.[39] After receiving information that there were drugs and/or weapons on school grounds, the school principal authorized the search of all student lockers.[40] The principal searched the plaintiff's locker and found a bag that contained a switch blade and a pager.[41] Both of these items were not permitted on school premises.[42] The plaintiff claimed that the school violated the Fourth Amendment because the search of his locker was based on a "vague and unsubstantiated rumor."[43] In particular, the student contended that (1) the school lacked reasonable suspicion to search his locker; and that (2) by searching his bag, the search was unreasonable in scope.[44] This court noted, in accordance with *T.L.O.*, that in the school setting, the standards for reasonable searches and seizures under the Fourth Amendment are relaxed.[45] Although the Court of Appeals acknowledged the *T.L.O.* standard in its opinion, it did not undertake the *T.L.O.* analysis because

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[36] *Id.*
[37] *Id.* at 1366–67.
[38] *Id.* at 1368.
[39] *In re*: Patrick Y, 746 A.2d 405, 414 (Md. 2000).
[40] *Id.* at 407.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *In re: Patrick Y*, 746 A.2d at 410.

of its preliminary finding that students do not have a legitimate privacy interest in an assigned locker.[46]

In *Klump v. Nazareth Area School District*, the plaintiffs alleged that the search of their son's cell phone by a school official was "unreasonable" in violation of the Fourth Amendment.[47] The cell phone was initially searched because displaying a cell phone during school hours was a violation of the school's policy.[48] The administrators used the student's cell phone to investigate and possibly find further violations of school rules.[49] The school official found a text message that the student received from his girlfriend asking him to bring her a "f***in' tampon."[50] The school argued to the court that "tampon" is slang for a marijuana cigarette.[51] This prompted further investigation of the cell phone.[52]

The United States District Court for the Eastern District of Pennsylvania recognized that *T.L.O.* was the governing standard for school-conducted searches of student property, but stated that even though the standard is not as strict as the traditional Fourth Amendment standard, the search must nonetheless be reasonable with regard to the circumstances.[53] The court found that the first prong of the *T.L.O.* standard—that the search must be justified at its inception—was satisfied because the student was violating the school's policy against displaying or using a cell phone on school grounds.[54] With respect to the second prong of the test—that the search must be reasonable in scope—the court found that the search was unreasonably broad given the totality of

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[46] *Id.* at 414.
[47] Klump v. Nazareth Area Sch. Dist., 425 F. Supp. 2d 622, 629 (E.D.Pa. 2006),
[48] *Id.* at 630.
[49] *Id.* at 628.
[50] *Id.* at 631.
[51] *Id.*
[52] *Id.*
[53] *Klump*, 425 F. Supp. 2d at 641.
[54] *Id.* at 640.

the circumstances.[55] The court reasoned that the justification for seizing the phone was not sufficient to allow the school to search through the student's text messages, voice mails, and call logs, and that it was unreasonable to use the cell phone to anonymously contact other students.[56]

In *Veronia School District 47J v. Wayne Action*, the Supreme Court upheld the school district's drug policy of randomly drug testing student-athletes, finding that the policy satisfied both prongs of the *T.L.O.* test.[57] In this case, the school district mandated that the student-athletes participate in a drug testing program with parental consent.[58] A student and his parents refused to sign the consent forms and filed a suit against the school district for violations of the Fourth Amendment.[59] The Court upheld the school district's drug policy because it found that not all searches required "individualized suspicion" in order to be constitutional.[60] The Court noted that certain circumstances, namely a pervasive drug problem in the school, may allow school officials to conduct broader searches.[61] Scalia, in his majority opinion, also posited that student-athletes have a lesser expectation of privacy due to their voluntary involvement in sports.[62] The Court narrowed its holding by positing that as long as the drug policy was aimed only at the investigation of drug violations by its student-athletes, the search was constitutional under the *T.L.O.* standard.[63]

In 2009, the Supreme Court applied the *T.L.O.* standard to determine the "reasonableness" of a strip search conducted by a school official on a student.[64] The school's student code strictly prohibited "the nonmedical use, possession, or sale of any drug on school

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[55] *Id.* at 641.
[56] *Id.*
[57] Veronia Sch. Dist. 47J v. Wayne Action, 515 U.S. 646, 664 (1995).
[58] *Id.* at 650.
[59] *Id.* at 651.
[60] *Id.* at 664.
[61] *Id.* at 663.
[62] *Id.* at 657.
[63] *Veronia Sch. Dist. 47J*, 515 U.S. at 663.
[64] Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2634 (2009).

grounds."[65] A student informed school officials that the plaintiff's daughter was in possession of prohibited drugs.[66] The school contended that this provided sufficient reasonable suspicion to justify the search of the student's belongings.[67] In conjunction with this investigation, the student was brought to the school nurse and was forced to remove her bra and expose part of her pelvic region.[68]

The Court used the *T.L.O.* standard and held that the strip search of the student violated the Fourth Amendment.[69] Although the Court found that the search was "justified at its inception" because the school had information that the student was violating a school policy against the possession of drugs, it ultimately found that search violated the Fourth Amendment because it failed the second prong of the *T.L.O.* standard.[70] The Court found that the strip search was unreasonable in its scope because the degree of intrusion was not warranted by the degree of suspicion.[71]

C. Conclusion

The *T.L.O.* standard is still adequate in providing guidance as to the constitutionality of a search and seizure of a student's bag or locker by a school official with regards to investigation of drugs or weapons violations, but it is inadequate in determining a school administrator's authority to search and seize a student's cell phone in connection with a bullying investigation. It is clear that schools will have an easier time passing constitutional muster when searching and seizing a student's personal property to investigate suspected school-rule violations because these issues are clearly established. It is less clear, however, how this standard applies in cases

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[65] *Id.* at 2634.
[66] *Id.* at 2640.
[67] *Id.* at 2641.
[68] *Id.* at 2638.
[69] *Id.* at 2641.
[70] *Stafford Unified Sch. Dist. #1*, 129 S. Ct. at 2641–42.
[71] *Id.*

involving a search and seizure of a student's cell phone to investigate allegations or complaints of bullying. The complications of this situation are compounded when a school official searches and seizes a student's smart-phone to further its survey of a bullying infraction. There are several issues involved in this inquiry: (1) Does a student have a privacy right in his or her personal cell phone?; (2) Has the problem of bullying reached a level where the law will allow school administrators greater latitude to investigate students' cell phones?; (3) What is the reach of school administrators' authority when a cell phone is used on school grounds to bully another student?; (4) What is their authority to investigate a student's cell phone that is used off-campus to bully a student?

III. Problems Presented by the Advancements of the "Cell Phone"

A. Capabilities of the Cell Phone

With the evolution of the cell phone into the "smart phone," our handheld telephones now have the capacity to function as mini-computers.[72] These smart-phones have the ability to store massive amounts of personal information, including text messages, voice mails, and emails, as well as all information contained in the user's web browser.[73] As cell phones continue to advance, several legal issues are implicated, including the degree of privacy interests that an individual may have in his or her personal cellular device.

Charles Arthur, writer for *The Guardian*, posited that smart phones are actually more technologically advanced than our PCs, and that these devices are out-selling PCs.[74] Further, Tomi Ahonen, a former Nokia executive, contended that "[s]martphones will keep growing in

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[72] Charles Arthur, *How the Smartphone is Killing the PC*, THE GUARDIAN, June 5, 2011, http://www.guardian.co.uk/technology/2011/jun/05/smartphones-killing-pc.
[73] *Id.*
[74] *Id.*

sales approaching the billion-plus levels of total handset sales before this decade is done . . . ."[75] Because cell phones are becoming very advanced and heavily consumed to the point that a large majority of Americans are essentially carrying a personal computer in their pockets, the law needs to be reconsidered in several areas, especially within the realm of the Fourth Amendment.

B. Privacy Interests and Rights in Cell Phones

As cell phones continue to advance, courts are deciding cases in which law enforcement officials, without a warrant, search a person's cellular device in conjunction with their investigation.[76] Since there is a lack of case law regarding a student's privacy interests in his or her cell phone, this Comment will undertake a general analysis of such privacy rights and attempt to impose these principles of law into the school setting.

One approach that courts have used in analyzing warrantless cell phone searches is to analogize the cell phone to a closed container.[77] In *United States v. Finley*, the defendant was arrested during a traffic stop based on law enforcement's assertion that the passenger sold methamphetamine to an informant.[78] During the search of the vehicle, the police discovered a cell phone in Finley's pocket.[79] While the two suspects were being questioned, a law enforcement officer searched through the cell phone and found evidence of the drug transaction.[80] Although a law enforcement officer would typically need a warrant to search an individual's "closed container," this search was conducted pursuant to a lawful arrest, and thus the warrantless search of the "closed container" (cell phone) was reasonable under the search incident to arrest exception to the warrant requirement.[81] Since the investigation did not require

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[75] *Id.* at A2.
[76] *See, e.g.*, U.S. v. Young, 278 Fed. App'x. 242 (4th Cir. 2008).
[77] U.S. v. Finley, 447 F.3d 250, 260 (5th Cir. 2007).
[78] *Id.* at 253.
[79] *Id.*
[80] *Id.*
[81] *Id.* at 260.

a warrant in these circumstances, equating the defendant's cell phone to a closed container made the search of this property constitutional.[82]

The Fourth Circuit, in *United States v. Young*, imposed a slightly different approach than the "closed container" classification of the cell phone used in *Finley*.[83] In *Young*, the defendant filed a motion to suppress evidence obtained through a police officer's investigation of his text messages on the grounds that the search and seizure violated the Fourth Amendment.[84] During this warrantless search, officers seized a bag of heroin along with the text messages as evidence against the defendant.[85] The Fourth Circuit, citing *Finley*, held that the search and seizure of the text messages were permissible because the officer's need to obtain evidence from the cell phone outweighed the defendant's privacy interest in the cell phone.[86] This case presents another example of how some federal circuits are more protective of law enforcement officers' responsibility to preserve evidence than of an individual's right to privacy with regard to personal information contained in his or her cell phone.[87]

Another approach, which provides more protection to individuals' privacy interests in their personal cell phones against searches and seizures, was conveyed by the Supreme Court of Ohio in *State v. Smith*.[88] In this case, the defendant argued that the court should suppress the evidence obtained from the warrantless search of his personal cell phone because the search was unlawful.[89] The Supreme Court of Ohio noted three approaches that courts have used in recognizing an individual's privacy right in his or her cell phone, and decided to impose a

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[82] *Id.*
[83] *Compare* U.S. v. Young, 278 Fed. App'x. 242 (4th Cir. 2008) *with* U.S. v. Finley, 447 F.3d 250 (5th Cir. 2007).
[84] *Id.* at 244.
[85] *Id.*
[86] *Id.* at 245–46.
[87] *See id.*
[88] State v. Smith, 920 N.E.2d 949 (Ohio 2009).
[89] *Id.* at 951.

"legitimate expectation of privacy" test.[90] The Court reasoned that "[g]iven the continuing rapid advancements in cell phone technology, we acknowledge that there are legitimate concerns regarding the effect of allowing warrantless searches of cell phones, especially so-called smart phones, which allow for high-speed Internet access and are capable of storing tremendous amounts of private data."[91] Although the *Smith* court rejected the closed-container approach used in *Finley* and *Young*, it was not willing to provide cell phones with the high privacy rights given to laptop computers.[92] This court held that,

> because a cell phone is not a closed container, and because an individual has a privacy interest in the contents of a cell phone that goes beyond the privacy interest in an address book or pager, an officer may not conduct a search of a cell phone's contents incident to a lawful arrest without first obtaining a warrant.[93]

The third and most protective approach of an individual's privacy right against the search and seizure of a personal cell phone was conveyed in *United States v. Park*.[94] In this case, law enforcement officers, pursuant to a warrant, searched the building that Park had just exited.[95] Through the search, officers discovered drug-paraphernalia that is normally used for cultivating marijuana.[96] The officers arrested Park pursuant to this evidence and seized his cell phone.[97] Before the arresting officer returned the cell phone to the booking officers, he recorded names and numbers from Park's cell phone.[98] The United States District Court for the Northern District of California recognized that contemporary cellular devices "have the capacity for storing immense amounts of private information,"[99] and thus likened the devices to laptop computers—

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[90] *Id.* at 954.
[91] *Id.*
[92] *Id.* at 955.
[93] *Id.*
[94] U.S. v. Park, No. 05-375, 2007 U.S. Dist. LEXIS 40596 (N.D. Cal. May 23, 2007).
[95] *Id.* at *4.
[96] *Id.*
[97] *Id.* at *5.
[98] *Id.* at *8.
[99] *Id.* at *21

in which arrestees have significant privacy interests—rather than to address books or pagers, in which arrestees have lesser privacy interests.[100] Because the search in this case did not satisfy the narrow exceptions that allow officers to search a cell phone's information without a warrant, which include concern for the officer's safety, the court found that the search was unreasonable and suppressed the evidence obtained from the cell phone.[101]

Because of the continued technological advancements of cell phones and smart phones, it appears that the *Park* approach should become the standard for analyzing an individual's privacy rights in his or her cell phone against searches and seizures. This is the most reasonable approach because, as noted earlier, the capability of modern-day cell phones is practically that of a laptop computer. Laptop computers are capable of storing large quantities of personal information and are thus given a high degree of privacy protection; cell phones should be treated the same, especially as the technology and consumption of smart phones continues to progress.

The issue that remains unresolved by the courts is how to analyze a student's privacy rights in his or her personal cell phone with regard to a school-conducted search and seizure of its contents. The Supreme Court in *T.L.O.* provided that the standards of the Fourth Amendment are more relaxed in the school setting.[102] Yet, now that the cell phone technology continues to advance, the courts will have to decide whether to give more protection to the private information contained in these smart phones, or to continue the trend of providing school officials with flexibility in searching and seizing student property in conjunction with its investigations of school policy infractions. The courts must acknowledge that modern cell phones, especially smart phones, are capable of storing a variety of personal information which implicates a sensitive privacy issue when they are subject to search and seizure. In the interest of

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[100] *Park*, 2007 U.S. Dist. LEXIS 40596 at *21–22.
[101] *Id.* at *25.
[102] *See* N.J. v. T.L.O., 469 U.S. 325, 340–41 (1985).

protecting students and faculty members, however, courts and lawmakers should weigh in favor of granting school administrators the appropriate latitude to maintain order and security even at the expense of infringing on student's privacy rights.

Because of the technological advancements of cell phones, however, courts will have to recognize the sensitive privacy issues implicated by searching and seizing the information contained in these devices. The vast capabilities of smart phones present two competing issues. First, since smart phones are able to store vast amounts of personal information like computers, courts may consider granting students more privacy rights against searches and seizures of their personal cell phones by school officials. Students would have a stronger argument that modern cell phones should carry a higher degree of privacy protection because of their advanced capabilities. On the other hand, students' use of smart phones both on and off school grounds can impede the school officials' crucial responsibility to prevent instances of bullying, and, as such, courts may consider granting school officials greater latitude in conducting such searches, regardless of the privacy interests at stake. School officials are in dire need—especially as bullying is becoming more prevalent—of the courts' assistance in the fight against student violence and deaths for which bullying is responsible. Although protection of individual privacy is an important issue, the courts should weigh in favor of providing schools greater authority in regulating and investigating bullying.

IV. The Pervasive Problem of Bullying

Although bullying has always been a part of our society, this issue has reached a point where it poses a true threat to the safety and progress of students across the country. In the wake of tragedies such as the Columbine shooting[103] and Rutgers University's Tyler Clementi's

[103] *See infra* note 124.

death[104], both of which were linked to the effects of bullying, forty-seven state legislatures have enacted anti-bullying laws to help prevent future devastations.[105] Bullying has a negative impact on both the safety of students and faculty in school, and on the academic experience that students have a right to enjoy.

The main difficulty that school administrators have with cyber-bullying is their inability to detect the harmful behavior.[106] Cyber-bullying allows "[s]tudents [to] gang up against one another without leaving their bedrooms."[107] Consequences of cyber-bullying are more pervasive than instances of physical bullying because once a derogatory term or group is posted on the Internet, it is there for everyone to notice.[108] The Internet creates a dangerous platform for bullying, and having a smart phone accessible at all times allows bullies to continually harass their victims.

This section will observe (1) state initiatives undertaken in order to control bullying, (2) the negative impact that bullying has on the school administration's ability to maintain order and discipline among the student body, and (3) the negative impact that bullying has on student-victims' ability to focus in school and perform academically.

A. State Initiatives to Combat Bullying in Schools

Forty-eight states to date have enacted some type of anti-bullying statute in order to provide school administrations with an appropriate guide on how to detect, report, and

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[104] *See infra* note 121.

[105] Adam Cohen, *Why New Jersey's Antibullying Law Should Be a Model for Other States*, TIME U.S., Sept. 6, 2011, *available at* http://www.time.com/time/nation/article/0,8559,2091994,00.html.

[106] Sarah Palmero, *Invisible Taunts*, THE KNOXVILLE NEWS-SENTINEL, Apr. 30, 2010, *available at* http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=CITE&fpDocs=&fpNodeId=&fpCiteReq=&expNewLead=id%3D%22expandedNewLead%22&fpSetup=0&brand=ldc&_m=5420e59f59acfaa9cfbed73b66b6157c&docnum=4&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzV-zSkAl&_md5=d94e439e0e6626622f3629043f5a3628&focBudTerms=&focBudSel=all.

[107] *Id.*

[108] *Id.*

investigate instances of harassment, intimidation, and bullying.[109] New Jersey, which is recognized as having one of the strictest anti-bullying provisions in the country, recently amended its 2002 anti-bullying statute to include an "Anti-Bullying Bill of Rights."[110] The focal point of this "Bill of Rights" is to provide school officials with the appropriate training and timelines they need to effectively handle incidents of student bullying.[111] One of these guidelines reads:

> Once an incident is reported, principal must inform parents of students involved, and an investigation on the incident must be initiated within one school day of the report. A written report of the incident must be completed after two days, and an investigation must be complete after 10 days of the written report. Results of investigation must be given to the superintendent within two days of completing the inquiry. Superintendent may then decide to take action, and dole out discipline. Schools superintendent must inform the board of education about the investigation at its next meeting, then must give information to parents of students within five days of sharing information with the board. Parents can request confidential hearings before the board, which must be scheduled within 10 days.[112]

The New Jersey provisions exceed the normal requirements of most anti-bullying statutes in the United States.[113] New Jersey's law provides that "schools must conduct extensive training of staff and students; appoint safety teams made up of parents, teachers, and staff; and launch an investigation of every allegation of bullying within one day."[114] As evidenced by the abundant efforts that New Jersey and other states have made to improve their anti-bullying laws, bullying is a vexing problem in our society, and one that communities and governments across the country consider a top priority.

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[109] Tanya Roscorla, *Michigan Requires School Districts To Create Anti-Bullying Policy*, CONVERGE MAGAZINE, Dec. 7, 2011, *available at* http://www.convergemag.com/policy/Michigan-Requires-School-Districts-to-Create-Anti-Bullying-Policy.html (explaining that all states except Montana and South Dakota have adopted such legislation so far).
[110] Matt Freidman, *N.J. Gov. Christie Approves Toughest Anti-Bullying Law in the Country*, STATEHOUSE BUREAU, Jan. 7, 2011, *available at* http://www.nj.com/news/index.ssf/2011/01/nj_gov_christie_approves_tough.html.
[111] *Id.*
[112] Alvarado, *supra* note 8.
[113] *See supra*, note 105.
[114] Alvarado, *supra* note 8.

B. Bullying Threatens Security in Schools

There are three main consequences of bullying that threaten the safety of students and faculty across the country. The first two result from pervasive or chronic bullying, which may lead the victim to either kill him or herself, classmates and/or teachers, or both. First, students who are victims of bullying can become so overwhelmed by abuse and humiliation to the point that the victim decides to take his or her own life.[115] For example, Ryan Patrick Halligan decided to take his own life as a result of pervasive bullying by his peers.[116] The bully in this situation victimized Ryan over the Internet; he took a conversation that the two boys had out of context and turned it into a rumor that Ryan was gay.[117] This message permeated throughout the entire student body.[118] Further, one of the more popular girls at the school persuaded Ryan into believing that she was interested in him.[119] She later shared all of her online conversations with Ryan to other students for the purpose of humiliating him.[120] Ryan, in response, stated that "it was girls like her that made him want to kill himself."[121] That is exactly what transpired as a result of aggressive cyber-bullying by Ryan's peers.[122]

Another tragedy connected with bullying occurred in 2010 involving a freshman at Rutgers University. Tyler Clementi was eighteen years old when he committed suicide because his roommate posted live images of Clementi having sexual relations with another man on the

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[115] Jessica Moy, *Beyond "The Schoolhouse Gates" and into the Virtual Playground: Moderating Student Cyberbullying and Cyberharassment After* Morse v. Frederick, 37 HASTINGS CONST. L.Q. 565, 568–69 (2010).
[116] *Id.* at 567–68.
[117] *Id.* at 567.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] Moy, *supra note* 101, at 567–68.
[122] *Id.* at 568.

Internet.[123] The roommate set up a webcam in order to document Clementi having a sexual encounter with another man and to post the findings on the Internet.[124] As a result of cyber-bullying, Clementi decided to take his own life rather than endure the humiliation of having his private life exposed over the Internet for everyone to view.[125]

Second, a victim of bullying can become overwhelmed by the pervasive harassment to the point that the victim is thrown into uncontrollable rage, potentially causing the victim to respond with deadly force against the bully and even other members of the school. "Bullying instigated over 40 school shootings that took place during the past decade."[126] The gunman of the Virginia Tech shootings, who was only twenty-three years old, stated before killing thirty-three people, including himself, "You thought it was one pathetic boy's life you were extinguishing. Thanks to you, I die like Jesus Christ to inspire generations of the weak and the defenseless people."[127] Cho Seung-Hui, the gunman, was bullied for such a long period of time that it resulted in the student's decision to go on a shooting spree.[128]

The shooters in the Columbine killings cited a similar explanation as to why they committed such a heinous act of violence.[129] Eric Harris and Dylan Klebold claimed that they were ridiculed by their fellow classmates incessantly to the point that they decided to take

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[123] Kelly Heyboer, *Rutgers Freshman is Presumed Dead in Suicide After Roommate Broadcasts Gay Sexual Encounter Online*, THE STAR-LEDGER, Sept. 29, 2010, http://www.nj.com/news/index.ssf/2010/09/hold_new_rutgers_post.html.
[124] *Id.*
[125] *Id.*
[126] Jessie Klein, *Bully Rage: Common School-Shooter Misery*, HUFFINGTON POST, Apr. 22, 2007, http://www.huffingtonpost.com/jessie-klein/bully-rage-common-schools_b_46548.html.
[127] *Id.*
[128] *Id.*
[129] *Id.*

matters into their own hands.[130] It was clear that these shooters had a lot of built up anger due to an extended period of bullying and harassment.[131]

The third consequence of bullying occurs when the actual victim is physically assaulted as a result of the bullying. This type of violence usually occurs in the traditional sense where an older and/or stronger bully uses his or her physical attributes to intimidate and harass a younger and/or weaker victim. An example of this consequence occurred when a high-school female student was physically assaulted by a group of girls over a MySpace argument.[132] When the victim entered her friend's house, six girls were waiting to verbally and physically assault her.[133] The entire attack was videotaped and was posted on the Internet.[134] This consequence of bullying is the least alarming of the three, but as seen in the situation above, it is still a concern that school administrators must confront.

C. Bullying Negatively Impacts Students' Academic Performance

Since cyber-bullying victims become overwhelmed with depression, anger, and frustration, these emotions, in most cases, result in victims' inability to focus and perform academically.[135] "Stories shared by cyberbullying victims attest to the fact that cyberbullying can decrease students' grades and performance in school."[136] Maria Eisenberg and Dianne Neurmark, in their article *Peer Harassment, School Connectedness and Academic Achievement*, noted "that students who are bullied are more likely to miss school which in turn adds to being

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[130] *Id.*
[131] *Id.*
[132] *Girls Record Brutal Attack On Teen To Allegedly Post on YouTube*, WFTV.COM 9, (Apr. 8, 2008), http://www.wftv.com/news/news/girls-record-brutal-attack-on-teen-to-allegedly-po/nFCH8/.
[133] *Id.*
[134] *Id.*
[135] *See infra* note 137.
[136] Karly Zande, *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Student Cyberbullying*, 13 BARRY L. REV. 103, 112 (2009).

disconnected and missing educational opportunities."[137] In an article to the UCLA Newsroom, Stuart Wolpert discussed a study conducted of 2,300 students in eleven public schools in the Los Angeles area.[138] The research revealed that a higher level of bullying was directly connected to a decrease in grade point average.[139] The study also produced findings that

> [t]he students who were rated the most-bullied performed substantially worse academically than their peers. Projecting the findings on grade-point average across all three years of middle school, a one-point increase on the four-point bullying scale was associated with a 1.5-point decrease in GPA for one academic subject (e.g., math)—a very large drop.[140]

It is clear from the various studies highlighted above that bullying creates a true threat to a student's security in the classroom and his or her ability to perform academically. Since bullying has become such a prevalent issue in our society today, schools are becoming active to prevent its dire consequences. Nonetheless, it remains that school officials have a limited ability to regulate student bullying without violating their students' constitutional rights.

V. Public School Officials' Authority to Search Student Cell Phones Used On School Premises to Bully

As discussed above, *T.L.O.* and subsequent cases convey that Fourth Amendment standards are relaxed when a search and seizure is conducted in the school setting.[141] Through an analysis of several cases with respect to school-conducted searches of on-campus violations, this section will determine that public school officials' have the authority to lawfully search a student's cell phone that is used to bully another student during school hours.

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[137] Robert Lillis, *Relationship Between Bullying and Academic Achievement and Direct and Indirect Impact of Olweus Bullying Prevention Program: A Brief Review of Literature*, EVALUMETRICS RESEARCH REPORT (2011).
[138] Stuart Wolpert, *Victims of Bullying Suffer Academically as Well, UCLA Psychologists Report*, UCLA NEWSROOM, Aug. 19, 2010, *available at* http://newsroom.ucla.edu/portal/ucla/victims-of-bullying-suffer-academically-168220.aspx.
[139] *Id.*
[140] *Id.*
[141] *See supra* note 24.

Although there is sparse case law that deals specifically with the legality of a search and seizure of a student's personal cell phone, there are several relevant cases that provide guidance. In *Klump*,[142] the United States District Court for the Eastern District of Pennsylvania reviewed an important issue that school officials will always have to face when searching a student's cell phone.[143] An administrator must determine how much of a student's personal information he or she can lawfully search.[144] This case is important to this discussion because it indicates that there is a threshold as to how much information contained in a cell phone a school official can search.[145] As noted earlier, cell phones, especially smart phones, trigger a sensitive privacy issue because of their capacity to store vast amounts of personal information.[146]

Another example of school-conducted searches of student property to investigate school-policy violations on-campus is seen in *Binder v. Cold Spring Harbor Central School Distrisct.*[147] Pursuant to a suggestion by a teacher and the scent of marijuana permeating from the student, an assistant principal and security guard searched the student's pockets and personal book-bag.[148] Through his search of the student's book-bag, the school official found a large plastic bag with several small plastic baggies that contained marijuana.[149] Possessing cigarettes, drugs, or drug paraphernalia on school grounds violated school policy.[150] The court found that the search conducted by the assistant principal and security was reasonable, and thus constitutional.[151]

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[142] *See* discussion *infra* Part II.
[143] Klump v. Nazareth Area Sch. Dist., 425 F. Supp. 2d 622, 628 (E.D.Pa. 2006).
[144] *Id.* at 641.
[145] *Id.*
[146] *See supra* note 100.
[147] Binder v. Cold Spring Harbor Cent. Sch. Dist., No. CV 09-4181, 2010 U.S. Dist. LEXIS 83493 (E.D.N.Y. July 19, 2010).
[148] *Id.* at *3.
[149] *Id.*
[150] *Id.* at *5.
[151] *Id.* at *18.

Binder demonstrates another application of the *T.L.O.* standard with regards to a school official searching a student's personal property. In *Binder*, the property at issue was the student's book-bag.[152] Although this is not a cell phone and does not implicate the same degree of individual privacy interests, it is analogous, as book-bags can also be considered highly personal. Yet, the *Binder* court found that because the student presented a high degree of suspicion that he was violating several school policies, it was reasonable for the school official to conduct a search through the student's personal property.[153] As noted earlier in this Comment, implication of a cell phone would most likely have made the *Binder* court's conclusion that the search was reasonable much more difficult. A cell phone has the capacity to store a greater amount of personal information than a bag, and the courts would recognize this fact. Also, the fact that the student was violating the student code of conduct while in school could arguably persuade the courts to allow school officials, as seen in *Binder*, more latitude in conducting searches and seizures of student property.

In *Sims v. Bracken County School District*, the Eastern District of Kentucky held that the search of a student's jacket pursuant to a narcotics-trained canine's alert was reasonable under the *T.L.O.* standard.[154] In December 2007, Bracken County High School officials announced that "[they] would periodically patrol school grounds for contraband through the use of KSP's narcotics-trained canines."[155] During a routine search of a classroom, these narcotics-trained "canines returned a positive alert on a student's jacket."[156] A search of the jacket revealed no drugs—only "a lighter, allergy eye drop, and $47.00."[157] Yet, the school officials asserted that

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[152] *Id.* at *3.
[153] *Binder*, 2010 U.S. Dist. LEXIS at *18.
[154] Sims v. Bracken Cnty. Sch. Dist., No. 10-33-DLB, 2010 U.S. Dist. LEXIS 110822, at *21–22 (E.D.Ky. 2010).
[155] *Id.* at *3.
[156] *Id.* at *4.
[157] *Id.*

the jacket did smell of marijuana.[158] The plaintiffs contended that the search and seizure of the student's jacket was unconstitutional because it was unreasonable in violation of the Fourth Amendment.[159] The court reasoned that the search of the jacket was constitutional because (1) the KSP dog's positive alert on the plaintiff's jacket made the search of this property reasonable at its inception,[160] and (2) the scope of the search was reasonably tailored to the degree of suspicion that the plaintiff posed.[161]

Although this case does not demonstrate a school official's authority to search a student's cell phone in conjunction with its investigation, *Sims* provides another example of a school-conducted search of a student's personal property. The *Sims* court found it permissible for a school official to search through a student's jacket because of the reasonable suspicion that it contained marijuana.[162] Yet, a jacket most likely does not implicate the same privacy issue as a phone. A jacket can only contain a limited amount of personal information before it reaches its capacity. The cell phone, however, has the vast capability of storing large amounts of personal information including text messages, voice mails, emails, etc.

Even though all of these cases do not implicate the search of a student's cell phone, they do provide some insight on how the courts would most likely resolve such a situation. As the *Park* court explained, the cell phone, especially the smart phone, implicates a sensitive privacy interest similar to the personal computer.[163] Because smart phones are evolving into mini-computers, it is becoming more difficult for school officials to justify such searches in order to maintain security and academic progress.

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[158] *Id.*
[159] *Id.* at *9.
[160] *Sims*, 2010 U.S. Dist. LEXIS 110822, at *22.
[161] *Id.* at *23.
[162] *Id.* at *22.
[163] *See supra* note 100.

Yet, the Supreme Court has remained consistent in the principle that school officials are allotted some flexibility when it comes to conducting investigations of students violating school policies and laws.[164] Students are not granted the same privacy interests as individuals walking on the streets.[165] The reason for this is that school administrations have the crucial responsibility of ensuring a safe learning environment for students under its control.[166]

As previously discussed, the advanced technology of cell phones implicates a sensitive privacy issue for students, while the pervasive problem of bullying triggers an important government interest in ensuring student safety. These competing interests present the courts with a potential dilemma in choosing whose interests should prevail: the students' or the government's.

Pursuant to the national initiative to prevent the horrific tragedies associated with bullying and the school's crucial responsibility of maintaining order and discipline among the student body, the courts must reconsider the *T.L.O.* standard to provide school officials' more authority in searching and seizing a student's smart phone to investigate instances of bullying on-campus. As noted earlier, bullying has been the catalyst of numerous assaults and killings across the country.[167] It is up to the courts to continue what the state legislatures have started, and establish a standard that allows schools the appropriate guidance and authority to prevent catastrophes such as the Columbine shootings and the death of Tyler Clementi. This revised *T.L.O.* standard should not only provide school officials with the authority to search and seize students' cell phones when used on-campus to bully, but should also, as discussed in the section

[164] *See infra* note 175.
[165] *See supra* note 20.
[166] *See supra* note 23.
[167] *See supra* note 115.

below, provide officials with authority to search and seize cell phones when the phone is used off-campus to bully.

VI. Public School Officials' Authority to Search Student Cell Phones Used Off-Campus to Bully

A. The *Tinker* Standard

Since school officials are attempting to investigate off-campus conduct, the initial question is whether public schools can discipline student conduct that transpires out of school. The cases are not completely consistent, but the Supreme Court created a basic framework to determine school officials' authority to regulate student expression that takes place off-campus.[168] The court established that if the student's conduct "substantially interfere[s] with the work of the school or impinge[s] upon the rights of other students" then school officials can assert their authority.[169] This standard was first established in the landmark Supreme Court case *Tinker v. Des Moines Independent Community School District.* In this case, school officials suspended students from school because they decided to wore black armbands as a form of protest against the Vietnam War.[170] The petitioners filed suit against the school for violating their First Amendment right of free speech.[171] The Court found that the school officials had in fact violated the students' freedom of expression under the First Amendment.[172] The Court reasoned that the students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[173] In order to determine whether the school's decision was permissible, the Court reasoned that the act of wearing the armbands had to result in a

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[168] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1968).
[169] *Id.*
[170] *Id.* at 504.
[171] *Id.*
[172] *Id.* at 511.
[173] *Id.* at 506.

"substantial disruption of or material interference with school activities."[174] Since the Court reasoned that no substantial disruption had occurred, the school had violated the petitioners First Amendment freedom of expression.[175] Although this case was not a dispute about disciplining student conduct off-campus, the *Tinker* standard was later used as the test for determining the constitutionality of school officials' discipline of student conduct that occurs outside of school.[176]

B. The *Tinker* Standard Applied to Schools Regulating Off-Campus Conduct

In *Morse v. Frederick*, the Court considered the *Tinker* standard in order to determine a school's ability to discipline student conduct that transpired off school grounds.[177] Here, students during a school sanctioned off-campus event held up a sign in an auditorium that stated: "Bong Hits 4 Jesus."[178] The principal asked the students to take down the banner, but the students refused to do so.[179] These students were subsequently suspended from school.[180] The students filed suit against the school for violating their First Amendment rights.[181] Using the *Tinker* standard, the Court found that the suspension of these students did not violate the First Amendment.[182] Using the "substantial disruption" analysis, the Court held that it was reasonable for the principal to request removal of the banner to be taken down because it clearly promoted the use of illegal drugs.[183] This sign, as the Court posited, could potentially cause a "substantial

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[174] *Id.* at 514.
[175] *Id.*
[176] *See* Morse v. Frederick, 551 U.S. 393 (2007).
[177] *Morse*, 551 U.S. at 400.
[178] *Id.* at 397.
[179] *Id.* at 398.
[180] *Id.*
[181] *Id.* at 399.
[182] *Id.* at 400.
[183] *Morse*, 551 U.S. at 402.

disruption" among the student body, and thus the school was justified in disciplining these students for their off-campus conduct.[184]

School officials are responsible for ensuring a safe learning environment for all students, and discouraging the promotion of drugs is well within their jurisdiction. *Morse* is an example of how courts handle student conduct when the schools' decision to punish collides with a student's potential constitutional rights. This case does not specifically deal with conduct that occurred off-campus because the conduct occurred at an off-campus school sanctioned event, but *Morse* demonstrates how the *Tinker* standard provides school officials more flexibility in their ability to regulate offensive conduct that would otherwise be a violation of students' constitutional rights.

In *J.S. v. Blue Mountain School District*, the Third Circuit used the *Tinker* standard to help resolve the constitutionality of a school district's decision to punish a student's conduct off-campus.[185] Here, the student was disciplined for creating an internet profile of her principal that contained inappropriate content.[186] This student only provided access to the profile to herself and her friends.[187] J.S. was suspended for creating this profile that depicted the school principal using inappropriate language and conduct."[188] The parents of J.S. sued the school district for violating their daughter's First Amendment rights.[189]

The Third Circuit, as an initial matter, found that the *Tinker* standard applied.[190] Yet, the court noted that this standard has several narrow exceptions of types of speech that schools can suppress, the first being "'lewd,' 'vulgar,' 'indecent,' and 'plainly offensive' speech in

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[184] *Morse*, 551 U.S. at 410.
[185] J.S. v. Blue Mountain Sch. Dist., No. 08-4138, 2011 U.S. App. LEXIS 11947, at *22. (3d Cir. June 13, 2011).
[186] *Id.* at *1.
[187] *Id.*
[188] *Id.* at *2.
[189] *Id.*
[190] *Id.* at *22.

school."[191] The second exception grants schools the ability to regulate "school sponsored speech."[192] The third exception, highlighted in *Morse*, is speech that occurs during a school-sponsored event.[193] The court, however, held that the exceptions to *Tinker* did not apply, and that the students' conduct at issue did not cause a "substantial disruption of or material interference with school activities."[194]

This case is extremely important to this Comment's analysis because it affirms the principle that the *Tinker* standard is applicable when analyzing school officials' ability to regulate off-campus conduct. In *J.S.*, the Third Circuit found that the student's creation of a profile making fun of the school principal did not result in a "substantial disruption," but rather caused only minor interferences with the functioning of the school.[195] Although this circuit was not willing to allow the school officials to regulate a student making a profile with disparaging materials against the school principal, using the smart phone to post comments to bully another student implicates a more sensitive and threatening set of circumstances.

Since the courts have yet to specifically rule upon the issue of whether a school official can confiscate and search a student's cell phone based on bullying that transpired off-campus, a new standard for dealing with this issue must be considered. Off-campus conduct provides an additional burden on the school's responsibility to prevent bullying. This problem is amplified by the ability that students have to use their smart phones to post disparaging videos, wall posts, text messages, or emails in an effort to humiliate another student. The current state of the law does not provide school officials with sufficient guidance on how to regulate students' off-campus use of their smart phones for bullying. Yet, the older standards that the Supreme Court

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[191] *J.S.*, 2011 U.S. App. LEXIS 11947, at *22.
[192] *Id.*
[193] *Id.* at *23.
[194] *Id.* at *28.
[195] *Id.*

established, when taken together, can provide school administrators with an appropriate framework that will take into consideration the technological capacities of smart phones compounded with the pervasive problem of bullying. This new standard must allow school officials to investigate and, when necessary, punish students when they use their smart phones on-campus and off-campus to bully and harass another student. The horrific deaths that have resulted from bullying should be reason enough for the courts to provide a revamped standard that will allow school administrators with the necessary authority to prevent these types of tragedies in the future.

Using the Supreme Court standards in *T.L.O.* and *Tinker*, school officials will be able to sufficiently investigate instances of bullying that transpire in and out of the school confines. Adding the *Tinker* standard as a prong to the current *T.L.O.* standard for school conducted searches and seizures will allow schools greater flexibility to regulate bullying of students. In addition to adding this prong to the current test, courts should apply the new standard using a balancing method where no one factor is dispositive. This will grant the school officials the appropriate authority to regulate bullying and allow the courts to use their discretion in deciding whether, under the circumstances, a search and seizure of a student's phone to investigate bullying was reasonable. For example, if a student posts a wall post on his or her Facebook account—which is viewable by the entire student body—with the intent to bully another student, then the application of the *T.L.O./Tinker* hybrid standard to a school official's search and seizure of the students smart phone will weigh (1) the justification of the search, (2) the reasonableness of the scope of the search, and (3) the potential that the use of the smart phone will result in a material or substantial interference with the workings of the school. If the court finds that the

bullying remark on Facebook via the smart phone would cause a substantial disruption in the school then the scope of the search will be expanded to prevent such interference.

The advanced technology of the cell phone that allows for the mass storage of private information provides students accused of bullying with a strong argument that their privacy interests may outweigh a school's interest in its investigation. The standard for searching a cell phone, or smart phone, by a school official investigating bullying needs to be revamped to the standard previously suggested in order to (1) allow school administrations the ability to uphold their respective state's anti-bullying statute; and (2) to close the door to this potential loop-hole that a bullying student can argue to avoid full investigation of his or her cell phone. By adding *Tinker* to the current standard, and giving this prong substantial weight, schools will be able to justify their searches and seizures based on the fact that bullying, in most cases, results in a "substantial disruption" of the learning environment in schools.

As anti-bullying statutes across the country continue to add stricter provisions to their current laws, school officials are being held to an extremely high standard to detect and investigate instances of bullying. Under the current state of the law it is unclear whether a school district would be liable for searching a student's cell phone in an investigation of bullying.[196] Since schools are also held responsible for not detecting and reporting cases of bullying[197] this puts school administrators in a predicament. The courts in the near future have to provide school officials with more guidance to allow them the appropriate authority to meet their important responsibilities mandated by their respective state's anti-bullying statute. Continuing the trend established in recent case law that favors granting school officials more leeway in governing the

[196] *See supra* note 6.
[197] *See supra* note 114.

safety of its students, establishing this hybrid standard will allow public schools to effectively regulate bullying that occurs on and off school grounds.

VII. Conclusion

Courts need to expand the *T.L.O.* standard to allow school administrators to lawfully search students' cell phones when the in- and out-of-school use of the device transpires in the bullying of another student. Since the continued advancement of the smart phone allows for the potential of bullies to evade a search by their school officials, the law needs to intervene to eliminate this potential loop-hole. State legislatures across the country have taken action in an effort to prevent the negative impact that bullying has on our students. The time is coming where the courts will also have to take action to assist school administrators in their pursuit of regulating and preventing bullying on and off school grounds. Adding the *Tinker* test to the *T.L.O.* standard for "reasonable" searches and seizures in the school setting, will allow school officials the ability to (1) maintain their responsibilities to the anti-bullying statutes provided by their respective states; (2) maintain their crucial obligations of sustaining a safe learning environment for their students; and (3) prevent future tragedies such as the examples provided previously in this Comment.